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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

72-596

No. A-264

EMIL F. ADAMS, ET AL,
Petitioner

vs.

EVANSVILLE-VANDERBURGH SCHOOL CORPORATION, ET AL.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Joseph A. Yocum
305 Union Federal Building
Evansville, Indiana 47708
Phone: (812) 423-3183
Attorney for Petitioners

Edwin R. Smith, Jr., Attorney
1304 Old National Bank Building
Evansville, Indiana 47708
Phone: (812) 425-5137
Of Counsel

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Petitioner Emil F. Adams, et al. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 21, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Southern District of Indiana also appears in the Appendix hereto. A motion to stay was filed and denied, by this court on September 1, 1972.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 21, 1972, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

For at least the last fifteen years, defendant has operated a unitary school system. Now, defendant proposes to racially discriminate in pupil assignment. Astonishing as it may be, an examination of the minutes, records and actions of defendant board since 1949 will fail to include one charge of "de jure" segregation by any interested party, but to the contrary, there is 100% unanimity, by all concerned, on the fact that such segregation that exists in defendant school system is "defacto" only. (See plaintiffs Exhibit 8 and defendants Exhibit D introduced at trial and a part of the certified record herein). H.E.W. first instituted the charge of "de jure" segregation in one of the 37 elementary schools operated by defendant namely, Lincoln elementary school. It is against this factual background that the following questions are presented:

1. Do the guarantees of the Fourteenth Amendment apply equally to all children, regardless of race, within a given school district?

2. Does the Fourteenth Amendment prohibit a school board from using race as a basis for pupil assignment?

3. Is the non-discriminatory neighborhood school no longer an acceptable institution within the educational system of the United States of America?

4. Is racial balance to become the law of the land and the stated objective of the federal government?

5. Does a school board have a duty to eliminate defacto segregation?

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title 28 U.S.C. § 1343, and Title 42 U.S.C. §§ 1981, 1983. This case involves rights under the federal constitution.

The facts are virtually undisputed in this case. Defendant's Exhibit D (introduced at trial) contains excerpts of defendant board meetings and actions from January 1949 to the present concerning the matter of school desegregation. A clear and concise history is presented therein, and it is against this background that petitioners largely rest their case.

Prior to 1949, defendant board followed the "separate but equal" doctrine in pupil assignment. In 1949 the Indiana Legislature, enacted legislation declaring such doctrine to be no longer permissible (See App. 9). There upon, the defendant board on April 11, 1949, immediately proceeded to comply with this new Act of the Indiana Legislature. Commencing in 1949-50 upon a grade per year basis, the dual system had been eliminated by 1957. Thereafter, all children residing within a geographical area of a given school in Evansville had the right to attend such school regardless of race. The attendance plan was based upon the traditional "neighborhood school" concept, without discrimination as to race or color. In 1962, Lincoln High School was dissolved due to declining enrollment (economy reasons) and each of the surrounding high school attendance zones was extended into the Lincoln attendance area (similar to pie slices) a few years later when the new "Central" High School was opened. In 1962, the "freedom of choice" plan was rescinded by the defendant board and all students regardless of race were required to attend the school in whose district they resided. In 1966, the voluntary transfer plan sometimes called "majority to minority" plan, was instituted. Thus, for at least the last ten years, defendant has maintained a unitary system without discrimination as to race or color. As said by Dr. Morgan, an

executive in defendant school corporation, during the trial:

> Q. 80. (by Mr. Smith) Dr. Morgan is the race of a student presently considered in the assigning of students among the elementary schools?
>
> A. (by Dr. Morgan) To my knowledge it has not been until this time – until this proposed plan has been presented.

Thus, up to the adoption on November 17, 1971, of the "desegregation" plan, all students, regardless of race, were required to attend the elementary school located in the area of their residence unless they took advantage of the voluntary transfer plan. School assignment was on a geographic basis, and the school location was determined in part by population density, future growth of the area, physical facilities, etc. The attendance zones, prior to 1971, were based upon the residence of the pupils, and not their race or color.

It is important to note that the attendance zones for the 37 elementary schools within defendant's school district were not gerrymandered in order to perpetuate segregation. At one time, both Stanley Hall and Wheeler were primarily "white" schools. These two schools are located in the so-called "inner-city" of Evansville and like all other cities, both north and south, became majority "black" schools through shifting neighborhood patterns. These two schools are to be closed, pursuant to the 1971 plan of defendant. Lincoln, prior to World War II, was bounded on the south and east with white neighborhoods, but, as in the case of Stanley Hall and Wheeler, it too has become located in the middle of black neighborhood.

Like many of her sister cities in the north, certain of defendant's schools became identifiable "black" or identifiable "white" not through any scheme or design by official action, but due to voluntary change in the neighborhood residential pattern in these cities. Evansville's history is very similar to Gary,[1] Indiana, which was involved in similar litigation in 1967.

[1] Bell v. School City of Gary (1963 CA7 Ind) 324 F2d 209, cert den 377 US 924, 12 L ed 2d 216, 84 S Ct 1223.

For example, Chestnut-Walnut school originally was an identifiable "white" school and then became an identifiable "black" elementary school, before being closed in 1957 for economic reasons. Likewise, Lincoln remained, up to 1971 as a virtually all "black" school, but this was not due to any official state action. Lincoln is located in a predominately Negro area and that is the reason why it is an identifiable "black" school as was the case in Gary, Indiana. It has not been shown that defendant ever took any affirmative action to perpetuate segregation in Evansville-Vanderburgh County.

These then were the existing facts in 1971 when H.E.W. appeared on the scene. As a result of the pressure of H.E.W.,[2] defendant adopted a desegregation and racial balance plan on November 17, 1971, involving Baker, Columbia, Delaware and Lincoln Elementary Schools. A copy of this plan is attached to petitioner's original complaint. These three schools are located in majority white neighborhoods and located within 1.2 miles of Lincoln School. The plan provides for a reassignment of white pupils from the Columbia, Baker and Delaware School districts to the Lincoln Elementary School, and a reassignment of black pupils from the Lincoln district to Columbia, Baker, Delaware and some eight other majority "white" elementary schools. As a result of this racial balance plan, defendant projects an estimated 70% white and 30% black in each of the four said schools. The proposed plan, among other things, calls for the transfer of 175 black children from Lincoln to Columbia, 123 black children from Lincoln to Delaware, and 164 black children from Lincoln to Baker, with 134 white children to be transferred from Baker to Lincoln, 80 white children from Columbia to Lincoln, and 157 white children from Delaware to Lincoln. It will result in increasing the enrollment in each of the four schools. The plan calls for 3,040 out of 22,280 or approximately 13.6% of the children to be bussed or reassigned. The plan will result in gerrymandering attendance zones in order to establish the desired racial

[2]U.S. Dept. of Health Education and Welfare.

balance in the 4 schools. None of the attendance zones for the four schools will be continuous and contiguous to any of said schools.

As a result of defendant's 1971 racial balance plan, certain white children (petitioners herein) presently attending Columbia, Baker and Delaware Elementary Schools will be bussed/transferred to Lincoln School in order to schieve racial balance among the four said schools. No white children from the remaining 33 elementary schools are to be bussed/transferred into Lincoln School pursuant to defendant's 1971 plan, although a number of these schools are to receive the black children from Lincoln. This action was instituted by the parents and children who are to be bussed or reassigned from Columbia, Baker and Delaware to Lincoln School.

On appeal, the Seventh Circuit Court of Appeals affirmed and held, in short, that the defendant board had the right to voluntarily adopt this racial balance plan if it so desired.

The following events occurred subsequent to trial herein and due to their relevancy are called to the Court's attention. On May 10, 1972, defendant board formally approved implementation of the 1971 plan by a four-three vote, and on August 2, 1972, due to change in board personnel, the board rescinded said racial balance portion of the 1971 plan which it had previously approved on November 17, 1971, and May 10, 1972, and which was the subject of complaint inthe instant case. By virtue of another action in the same district court the defendant board was ordered to reinstate the 1971 plan requiring bussing to achieve racial balance among the four said schools. The district court also took over jurisdiction of defendant school system. Thus, the plan "voluntarily" adopted by defendant on November 17, 1971, which was later rescinded, has now become a required court order by virtue of Martin et al., v. Evansville-Vanderburgh School Corporation[3] as of September 5, 1972.

[3] Martin, et al., v. Evansville-Vanderburgh School Corporation of Evansville, Vanderburgh County, Indiana (Southern District of Indiana, No. EV 71-C-79). Not as yet reported.

REASONS FOR GRANTING THE WRIT

1. The decision below results in:

   (a) denying to plaintiffs equal justice under the law.

   (b) discriminating against plaintiffs because of their race, as provided in the U.S. Constitution.

   (c) violates plaintiffs rights under Act 8 Sec. 1 of Indiana Constitution.[4]

The school system presently operating in Evansville, Vanderburgh County, Indiana is non-discriminatory. The defendant was, and is, operating a unitary system without regard to race or color in pupil assignment. The defendant's system is essentially the same as other school systems throughout the general northern part of the United States.

Whether defendants 1971 plan was in effect court ordered, or voluntarily adopted, the ultimate affect is the same insofar as these plaintiffs are concerned. The enfringement upon their rights remain the same.

The importance of this case lies in its uniqueness. As of the present time the Supreme Court of the United States has not passed upon the question herein presented, i.e., the use of race as a basis for pupil assignment in a school system that has heretofore based its assignments upon the residence of the pupils regardless of race or color.

The significance of this case lies in its potential impact on other northern unitary school systems who possibly at one time or another operated a legally permissible segregated facility. And by this I do not mean a school system being operated in the fashion of the school board in Swann vs.

[4]Common schools. – Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Charlotte-Mecklenburg Board of Education.[5]

The Supreme Court cases from Brown I and II[6] through Swann have all dealt with a southern type dual system where the school boards had a history of resisting the mandate of Brown I and II[6] to eliminate state imposed segregation. That is certainly not the factual situation presented in the instant case. The record clearly indicates that the defendant board, prior to H.E.W. intervention, had a history of complying first with the law prior to 1949 and then with the law after 1949. Since at least 1957 no child has been forced to attend a certain school because of his color nor has any child been denied the right to attend a school because of his color.

Something new has now been injected into defendant school system as a result of defendant's 1971 racial balance plan, as follows:

Racial discrimination is now being practiced in determining pupil assignment.

As a result of this new policy plaintiffs are:

Being denied equal justice under law.

Plaintiffs are being discriminated against because of their race. This is a direct violation of the Fourteenth Amendment rights guaranteed by the Constitution of the United States. It also clearly violates the holding of Brown I supra. As said in Brown II supra:

> "The Fourteenth Amendment prohibits a state from making racial distinction in the exercise of governmental power"

and also on page 1105 therein:

> "To that end, the courts may consider . . . revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis . . ."

[5] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 28 L.Ed. 554. (1971)

[6] Brown v. Board of Education, (1954) 347 U.S. 483, 98 L.Ed. 873 and 349 U.S. 294, 99 L. Ed. 1083

The Brown cases established the fundamental principal that racial discrimination or distinction in public education is unconstitutional under the Fourteenth Amendment.

Prior to defendants "1971 plan", the defendant school system was being operated within the mandate of Brown I and II. By the adoption of the "1971 plan" the defendant board is now operating in direct conflict with the court's ruling in those two cases. As further indicating the court's objection to racial classification for purposes of pupil assignment, I call the court's attention to the cases of Bolling,[7] Jefferson County,[8] Goss,[9] and Deal.[10] There are also a number of lower court opinions also disapproving the use of racial classification in pupil assignment, i.e., Bell supra, Briggs,[11] Evans,[12] Ellis,[13] Bryant[14] and Boyd.[15]

[7] Bolling v. Sharpe, 347 U.S. 497.

[8] U.S. v. Jefferson County Board of Education, (1966) 372 F(2) 836 aff'd. 380 F(2) 385 (1967).

[9] Goss v. Board of Education, 373 U.S. 683, 10 L.Ed. 2d 632, 83 S.Ct. 1405.

[10] Deal v. Cincinnati Board of Education, (6th Circuit, 1966) 369 F(2) 55.

[11] Briggs v. Elliott, (ESDC), 132 F. Supp. 776, 777.

[12] Evans v. Buchanan, 207 Fed. Supp. 870.

[13] Ellis v. Board of Education of Orange County, Florida, (5th Circuit) (1970) 423 F.(2) 203.

[14] Bryant v. Board of Education (U.S.D.C., S.D.N.Y., 1967) 274 F.Supp. 270.

[15] Boyd v. Pointe Coupee Parish School Board, (U.S.D.C.E.D. La. 1971) 332 F. Supp. 994.

We must address ourselves to this question:

> "Are plaintiff children being treated equally with the other children in defendant's system, or are they being discriminated against because of their race?"

If equal justice under law means what it appears to mean, then the rights of plaintiffs are to be equally considered with those of all other children, i.e., "black", and all children are to be treated the same under law, regardless of their race. This is the fundamental question presented in this case. Plaintiffs do not believe that the law allows one child to be treated differently than another child because of race or color. This kind of discrimination was struck down by Brown and if it applies to one race it certainly applies equally to another race. Needless to say, if plaintiffs were black children there would be no question as to their Fourteenth Amendment rights being violated by defendant's action. Can it be said that these plaintiffs do not enjoy those same rights?

The Swann case supra is not controlling precedent in this case. The law of that case is not applicable herein because the facts in each case are entirely different. If the decision in Swann can be extended to apply to the facts herein, then there would scarcely be a school jurisdiction in the United States which could not be interpreted or coming under "the umbrella of its' (Swann) protection." Such a prospect is indeed awesome, and would foretell unimagined consequences.

As I perceive the Swann case, it was directed as a school board which had intentionally "dragged its feet" in complying with the mandate of Brown II.

We believe the instant case fairly presents a typical northern school system with a history of compliance with existing law. If the court is of opinion that plaintiffs constitutional rights are not being violated we would then ask the court under what circumstance can a board choose to use race as a basis for pupil assignment without enfringing on the child's constitutional rights under the Fourteenth Amendment.

2. The decision below results in plaintiffs being denied their equitable rights.

The jurisprudence of equity largely determines cases such as herein presented. Particularly is this so when remedial measures are involved, such as was mandated by Brown II. Thus, the courts have largely relied upon equity in making their decisions.

One of the fundamental maxims of equity "declares that equality is equity" Southerland v. Mayer.[16] As said in 27 American Jurisprudence (2) p. 652:

> "Accordingly, equity will treat all members of a class on an equal footing, and will impose burdens or distribute rights without preference, either equally or in proportion to the several interests."

Apply this maxim to the facts of this case. If it was inequitable to bus black children away from a school nearest their residence because of their race (as in Brown v. Board of Education) then it is equally inequitable to bus plaintiff children away from their respective neighborhood schools (Columbia, Baker and Delaware) because of their race.

3. The decision below, unless reversed, will result in the eventual destruction of the neighborhood school in all the United States.

Schools have historically existed for the benefit of its pupils. The quality of their education has always been the first consideration. At no place has it been suggested that defendant's 1971 "plan" was designed to improve the quality of plaintiffs education. The term "equality of education" has been loosely used in these desegregation cases. As was so intelligently discussed in the Amicus Curiae Brief by the San

[16] Southerland v. Mayer 271 U.S. 272, 70 L.ed 943, 46 S.Ct. 538.

Francisco parents filed in the "Denver"[17] case, this term is indefinable, and has led to much confusion in the field of education. Apart from the constitutional question, it is now virtually conceded by the country's leading sociologists that this whole matter of forced desegregation in the public schools has had no appreciable effect upon the Negro children from the standpoint of education.

In the instant case, it is hard to imagine how the moving of black children out of their neighborhood school and putting white children in their seats is going to result in benefiting or improving the education of any of the children involved. The tragic result of this plan is compounded when you consider that the values and advantages of the neighborhood school concept, as an acceptable education policy, have not been disproved.

Thus, if the undisputed facts herein can justify such a racial balance plan, then this fundamental part of our social structure will have been destroyed.

4. If defendant's 1971 plan is allowed to stand, there will be no recognizable limit to the exercise of federal control over the public schools.

The defendants 1971 plan is the result of the incorrect conclusion of H.E.W. that because one elementary school in Evansville, Vanderburgh County (out of 37) was virtually all black this was conclusive evidence of a constitutional violation by the board. This conclusion is contrary to the undisputed facts. See defendant's Exhibit D in the trial below and certified herein. The undisputed fact is that this one elementary school (Lincoln) is located in a majority black

[17] Wilfred Keyes el al., v. School District No. 1, Denver, Colorado, et al., No. 71-507. 445 F 2d 990 (10th CIR. 1971) Cert. granted 92 S. Ct. 707 (Jan. 17, 1972) Presently pending in this court.

neighborhood, and was not the result of any official action on the part of the school board.

Thus if such a racial balance plan can be thrust upon Evansville, Vanderburgh County, Indiana then this Court has embarked upon dangerous and unchartered seas. If racial quotas are to become the law of the land, then it should be so stated. Otherwise, the extent of local control over school matters will be uncertain. Such a holding could conceivably be applied to private housing, etc.

Again, Petitioners wish to emphasize the fundamental difference between the past actions of defendant board and those of its neighboring boards in the south. In an unbroken chain since 1954, the decisions of this Court have dealt with southern school systems who were resisting the mandate of Brown v. Board of Education. This Court has not, as yet dealt with a northern unitary school system, admittedly being operated in a non-discriminatory manner.

CONCLUSION

For the reasons stated above, Petitioners ask that their petition be granted or the cause be remanded, and for all further and proper relief in the premises.

Respectfully submitted,

Joseph A. Yocum
305 Union Federal Building
Evansville, Indiana 47708
Phone: (812) 423-3183
Attorney for Petitioners

Edwin R. Smith, Jr., *Attorney*
1304 Old National Bank Building
Evansville, Indiana 47708
Phone: (812) 425-5137
Of Counsel